



U.S. Citizenship
and Immigration
Services

B6

FILE: WAC 02 210 51410 Office: CALIFORNIA SERVICE CENTER Date: 11/11/2004

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a landscape company. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on May 18, 1999. The proffered salary as stated on the labor certification is \$10.42 per hour or \$21,673.60 per year.

With the petition, counsel submitted copies of the petitioner's 1999 and 2000 Form 1120, U.S. Corporation Income Tax Return, and a copy of the petitioner's Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return, for the year 2001. Counsel also stated in a letter that the petitioner from May of 1994 to the present has employed the beneficiary. The 1999 income tax return reflected a taxable income before net operating loss deduction and special deductions of -\$15,665 and net current assets (current assets minus current liabilities) of -\$14,568. The 2000 income tax return reflected a taxable income before net operating loss deduction and special deductions of \$40,634 and net current assets (current assets minus current liabilities) of \$113,034. This evidence was considered insufficient by the director, and, on October 30, 2002, the director requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from the priority date of May 18, 1999 to be in the form of copies of annual reports, signed and certified federal tax returns, or audited financial statements. The director also requested that if the

petitioner employees more than 100 workers, a statement from a financial officer that establishes the petitioner's ability to pay the proffered wage be submitted.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return. The tax return reflected a taxable income before net operating loss deduction and special deductions of \$14,302 and net current assets of \$29,796.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on March 4, 2003, denied the petition.

On appeal, counsel submits additional copies of the above-mentioned federal tax returns and states:

Although the Service observed the amounts of cash assets reflected on the petitioner's tax returns, the Service failed to review the petitioner's cost of labor that shows labor paid to independent contractors. Please note that due to the petitioner's necessity of a Landscaper, the petitioner hires contractors, not as skilled as the beneficiary, in a monthly basis, to comply with customers' orders. That expense will be reflected in salaries and wages once the beneficiary is granted the legal right to work or the permanent residency in the United States. Form 1120 Schedule A, Item 3 shows \$1,148,337 and \$1,341,192 for fiscal years 2000, and 2001, respectively. For the year 1998 [sic] please refer to Form 1120 item 13 that shows salaries and wages paid in the amount of \$704,479. These funds have been available from the time the priority date was established.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not provide evidence that the beneficiary was compensated at a salary equal to or greater than the proffered wage in 1999, 2000, or 2001, merely that the petitioner paid wages.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no

precedent that would allow the petitioner to “add back to net cash the depreciation expense charged for the year.” See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

CIS may also review the petitioner’s net current assets as another means of determining the petitioner’s ability to pay the proffered wage. Net current assets are the difference between the petitioner’s current assets and current liabilities.¹ Net current assets identify the amount of “liquidity” that the petitioner has as of the date of the filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the petitioner’s current assets are sufficiently “liquid” or convertible to cash or cash equivalents, then the petitioner’s net current assets may be considered in assessing the prospective employer’s ability to pay the proffered wage.

The 1999 tax return reflects a taxable income of -\$15,665 and net current assets of -\$14,568. The petitioner could not pay the proffered wage of \$21,673.60 per year out of either the taxable income or the net current assets.

The 2000 tax return reflects a taxable income of \$40,634 and net current assets of \$113,034. The petitioner could pay the proffered wage of \$21,673.60 per year out of either the taxable income or the net current assets.

The 2001 tax return reflects a taxable income of \$14,302 and net current assets of \$29,796. The petitioner could pay the proffered wage of \$21,673.60 per year out of the net current assets.

While the copies of the petitioner’s 2000 and 2001 tax returns are sufficient evidence of the petitioner’s ability to pay the wage in those years, the fact that the petitioner had \$1,341,192 in cost of labor in 1999 is not sufficient evidence of the petitioner’s ability to pay the wage in 1999. There is no evidence that any of the \$1,341,192 was paid to the beneficiary and the petitioner has not supplied a 1999 Form W-2 for the beneficiary. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel advised that the beneficiary would replace contract workers. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner replaced them with the beneficiary. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

¹ A petitioner’s “current assets” consist of cash and assets that are reasonably expected to be converted to cash or cash equivalents within one year from the date of the balance sheet. As reflected on the petitioner’s balance sheets, current assets include, but are not limited to the following: cash, accounts receivable, inventories, pre-paid expenses, certain marketable securities, loans and promissory notes, and other identified current assets. A petitioner’s “current liabilities” are debts that must be paid within one year from the date of the balance sheet. Examples of current liabilities include, but are not limited to, the petitioner’s accounts payable, payroll taxes due, certain loans and promissory notes that are payable in less than one year, and any other identified current liabilities.